The owners and/or the demised charterers of the ship or vessel 'Winning Loyalty' v The owners and/or the demised charterers of the property or ship or vessel 'Shi Pu 1' (previously known as 'Jing Hui 2')

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-88–11 OF 2019
ATAN MUSTAFFA JC
22 MAY 2020

Shipping and Navigation — Action in rem — Sale of arrested ship — Defendant's cargo ship and plaintiff's vessel collided — Plaintiff's writ against defendant for damages and loss led to arrest of defendant's ship by Sheriff of High Court — Arrested ship anchored in open sea pending trial of action — Defendant could not maintain vessel or provide plaintiff with alternative security — Rapid deterioration of arrested vessel and mounting costs of its maintenance led plaintiff to apply to court for its sale pendente lite — Whether order had to be granted to prevent plaintiff's security in the vessel from diminishing further in value

Following a collision between the plaintiff's vessel, Winning Loyalty, and the defendant's vessel, Shi Pu 1, the sheriff of the High Court arrested Shi Pu 1 in the waters off the Port of Malacca premised on the plaintiff's writ against the defendant for loss and damages arising from the collision. The plaintiff's claim was in the region of RM1,716,660 but the defendant could not provide any alternative security for that claim apart from its vessel. Anchored in open sea and subject to the ravages of inclement weather, the Shi Pu 1 was fast deteriorating while the cost of guarding and up-keeping it mounted by the day. The plaintiff filed the instant application (encl 37) under O 70 r 20 of the Rules of Court 2012 for an order that the vessel and all consumables on board be appraised and sold pendente lite and that the proceeds of sale, after deduction of the sheriff's commission, costs and expenses, be paid into court as security for the plaintiff pending the outcome of the trial.

Held, allowing encl 37:

(1) There was good reason for the court to make the order for the appraisement and sale of Shi Pu 1 pendente lite as no alternative security was offered by the defendant (see para 21).

(2) The application was not premature and there was no principle of law or practice that said that an application such as the instant one could only be made after the statement of claim had been filed. The defendant's inability to provide alternative security was a good reason for the order for

sale to be made. It was not acceptable for the defendant to say that the statement of claim must be examined first to quantify the security as the defendant could have applied to court for the determination of the form and quantum of the security it could provide, but it did not do so (see para 22).

(3) The plaintiff's application was bolstered by the fact the defendant was unable to meet the costs and expenses of maintaining and preserving the vessel while it was under arrest. The defendant had repeatedly admitted in its letters to various parties that it was impecunious to the extent of suggesting that the plaintiff bear the costs of crewing the vessel and supplying fresh water to maintain and preserve the ship during the period of its arrest (see para 20).

(4) The plaintiff had established that the costs and expenses of maintaining and preserving the arrested vessel were increasing by the day, diminishing its value as a security for the plaintiff. The estimated sale value of the vessel was RM2m while the plaintiff's claim was a close RM1,716,660. The vessel had become a wasting asset and any undue delay in having it sold would only cause substantial hardship to the plaintiff (see paras 19, 27 & 35).

(5) The defendant's argument that it would be prejudiced if the vessel was sold because it was the defendant's main source of income could not be accepted. There was no principle in law that prejudice to the vessel owner if an order for sale was granted was something that the court had to consider since it could equally be said that the plaintiff would suffer prejudice if the order for sale was not granted and the vessel was left to deteriorate further (see para 34).

[Bahasa Malaysia summary

Lanjutan daripada perlanggaran antara kapal plaintif, Winning Loyalty, dan kapal defendan, Shi Pu 1, syerif Mahkamah Tinggi telah menahan Shi Pu 1 di perairan Pelabuhan Melaka yang berdasarkan kepada writ plaintif terhadap defendan untuk kerugian dan kerosakan berpunca daripada perlanggaran tersebut. Tuntutan plaintif adalah berjumlah sekitar RM1,716,660 tetapi defendan tidak dapat memberikan jaminan alternatif lain untuk tuntutan tersebut selain dari kapalnya. Berlabuh di laut terbuka dan berdepan perubahan cuaca buruk, Shi Pu 1 semakin merosot sementara kos untuk menjaga dan menyelenggara dipasang bertambahs setiap hari. Plaintif memfailkan permohonan semasa (lampiran 37) di bawah A 70 k 20 Kaedah-Kaedah Mahkamah 2012 untuk suatu perintah supaya kapal dan kesemua barangan di dalam kapal dinilai dan dijual pendente lite dan bahawa hasil penjualan, selepas menolak komisen syerif, kos dan perbelanjaan, dibayar kepada mahkamah sebagai wang jaminan bagi plaintif sementara menunggu keputusan perbicaraan.

Diputuskan, membenarkan lampiran 37:

(1) Terdapat alasan yang wajar bagi mahkamah untuk membuat perintah bagi menilai dan menjual Shi Pu 1 pendente lite kerana tidak ada jaminan alternatif lain yang ditawarkan oleh defendan (lihat perenggan 21).

(2) Permohonan tersebut tidak pramatang dan tidak ada prinsip undang-undang atau amalan yang mengatakan bahawa permohonan seperti permohan semasa hanya boleh dibuat setelah pernyataan tuntutan difailkan. Ketidakmampuan defendan untuk menawarkan jaminan alternatif adalah alasan yang wajar untuk perintah penjual dibuat. Ianya tidak boleh diterima bagi defendan untuk menyatakan bahawa pernyataan tuntutan haruslah dinilai terlebih dahulu untuk mengira jaminan tersebut kerana defendan seharusnya membuat permohonan kepada mahkamah untuk menentukan bentuk dan nilai jaminan yang dapat diberikannya, namun ianya tidak pernah dilakukan (lihat perenggan 22).

(3) Permohonan plaintif telah disokong oleh fakta bahawa defendan tidak dapat memenuhi kos dan perbelanjaan penyelenggaraan dan penjagaan kapal ketika ianya ditahan. Defendan berulang kali mengakui dalam suratnya kepada pelbagai pihak bahawa ianya tidak mempunyai wang sehingga mencadangkan supaya plaintif menanggung kos melantik anak kapal dan membekalkan air tawar untuk menyelenggara dan menjaga kapal selama tempoh penahanannya (lihat perenggan 20).

(4) Plaintif telah membuktikan bahawa kos dan perbelanjaan penyelenggraan dan penjagaan kapal yang ditahan semakin meningkat dari hari ke hari, sehingga mengurangan nilai jaminan bagi plaintif. Anggaran nilai penjualan kapal adalah RM2 juta sementara tuntutan plaintif adalah dalam anggaran RM1,716,660. Kapal tersebut telah menjadi aset yang sia-sia dan kelewatan dalam penjualannya hanya akan menyebabkan kesusahan yang besar kepada plaintif (lihat perenggan 19, 27 & 35).

(5) Hujahan defendan bahawa ianya akan diprejudiskan sekiranya kapal tersebut dijual kerana ianya adalah sumber kewangan utama defendan tidak boleh diterima. Tidak ada prinsip undang-undang yang akan memprejudiskan pemilik kapal sekiranya perintah penjualan dibenarkan adalah sesuatu yang harus dipertimbangkan oleh mahkamah oleh kerana dapat dikatakan bahawa plaintif juga akan mengalami prejudis sekiranya perintah penjualan tidak dibenarkan dan kapal dibiarkan semakin merosot (lihat perenggan 34).]

Cases referred to

Bank of Scotland Plc v The Owners of the M/V Union Gold and other cases [2013] All ER (D) 217 (Jun); [2013] EWHC 1696 (Admlty), QBD (refd)
Gulf Venture, The [1984] 2 Lloyd's Rep 445 (refd)
Kingstar Shipping Ltd v The owners of the ship or vessel 'Sino Glory' (ex 'Glory Singapura') (St Vincent and the Grenadines Flag) [1997] MLJU 86; [1997] 3 CLJ 731, HC (refd)
'Myrto', The [1978] 1 Lloyd's Rep 11, CA (refd)
SSK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 2) [2017] 8 MLJ 466, HC (refd)
'Suhaili 5201' Sing Koon Seng Shipbuilding & Engineering Pte Ltd, The v The 'Suhaili 5201' (owners and other persons interested in) [1988] 1 MLJ 210, CA (refd)
The United States of America v The owners of the vessels, 'Jade Phoenix' and 'Golden Phoenix' [1988] 2 CLJ 536, HC (refd)
Timberail Sdn Bhd v The owner and/or other persons interested in the vessel 'San Yang 2' [1998] 6 MLJ 434, HC (refd)
UAB Garant v The ship 'Aleksandr Ksenefontov' (2008) 746 LMLN 1, HC (refd)
Unicorn Lines (Pty) Ltd v MV Michalis S 1990 (3) SA 817 (D) (refd)

Legislation referred to

Rules of Court 2012 O 29 r 4(1), O 70 r 20

Mathew Kurien (Aaron Siva with him) (Sativale Mathew Arun) for the plaintiff.
Muhammad Amir Basaruddin (KK Lim) for the defendant.

Atan Mustaffa JC:

INTRODUCTION

[1] Enclosure 37 is an application filed by the plaintiff under O 70 r 20 of the Rules of Court 2012 ('the RC 2012') for, inter alia, the following orders:

(a) that the ship or vessel 'SHI PU 1' (previously known as 'JING HUI 2') (IMO: 8677196) ('the vessel') and the bunkers, fuel, lubricants and other consumables on board, if any be appraised and sold by the sheriff of the High Court by private treaty in the first instance and thereafter, if necessary, by public auction, such sale to be free and clear of all liens, charges and encumbrances; and

(b) that the proceeds of sale of the vessel, after deducting sheriff's commission, costs and expenses and all sums ordered herein to be treated as sheriff's costs and expenses be paid into court to the credit of these proceedings.

[2] The grounds of the application are that the defendant has failed to

provide any alternative security to obtain the vessel's release and that the vessel will continue to deteriorate physically thus resulting in a diminishment of value of the vessel.

[3] Having considered the application and the submissions of the parties, this court allowed the plaintiff's application in encl 37 with costs.

BRIEF FACTS

[4] The vessel was arrested by the sheriff of the High Court in the waters of Malacca Port on 25 November 2019 and has been under arrest since.

[5] The grounds of arrest of the vessel as set out in the writ in rem dated 14 November 2019 and in the affidavit leading to warrant of arrest affirmed on 25 November 2019. The arrest is premised on the plaintiff's claim for loss and damage arising from the collision by the vessel of the defendant, Jing Hui Shipping Sdn Bhd, with the plaintiff's bulk vessel 'WINNING LOYALTY' on 19 November 2017.

[6] At the time of her arrest by the High Court sheriff, the vessel was laden with cargo and manned with a crew of ten.

[7] On 29 November 2019, the defendant entered appearance in this action through its solicitors, Messrs KK Lim.

[8] On 2 December 2019, the defendant, through its solicitors, wrote to the plaintiff's solicitors to inquire about the amount or form of alternative security required to secure the release of the vessel from arrest. On 5 December 2019, the plaintiff responded through its solicitors and provided details on quantum and acceptable forms of security.

[9] On 10 December 2020, the defendant filed an application (encl 27) for the discharge of the vessel's sand cargo and the disembarkation and repatriation of the vessel's crew. While this application was pending for hearing before the court, the defendant discharged the cargo on board and moved the vessel without permission or authorisation from the sheriff of the High Court or the Marine Department and/or other relevant authorities. On 18 December 2020, encl 27 was heard and dismissed by the court.

[10] The plaintiff took out this application in encl 37 for the sale of the vessel pendente lite on 20 January 2020. No security had been offered by the defendant as the shipowner up to the date of this application.

THE LAW

[11] The power of the court to make an order for appraisement and sale pendente lite, ie pending litigation is derived from the inherent jurisdiction of the court and is regulated by O 29 r 4(1) of the RC 2012. An application for this purpose is made under O 70 r 20 of the RC 2012. The relevant commentary in Malaysian Civil Procedure, 2018 at para 70/20/8 is as follows:

> *The court has the power to make an order for appraisement and sale pendente lite, ie pending litigation*. This power is derived from the inherent jurisdiction of the court; *Castrique v Imrie* (1870) LR 4 HL 414; *The Hercules* (1885) 11 PD 10; *Hobbs, Savill & Co Ltd v The Vasilia (Owners), Albaran Bay Corp* [1972] 1 Lloyd's Rep 51. The power of the court in this respect appears to be supplemental and exercise of it is regulated by O 29 r 4(1). In any action, a court has the power to order the sale of property (the subject of a claim) which is perishable, likely to deteriorate or in relation to which there is good reason for sale ... *A sale pending suit is normally ordered on the grounds that retention of the property will cause the plaintiff's security to diminish if for no other reason than the mounting costs of arrest*. (Emphasis added.)

[12] In the landmark decision, *The 'Myrto'* [1978] 1 Lloyd's Rep 11 (CA) in deciding that it was an appropriate case for sale pendent it was stated that the court should not make an order for the appraisement and sale of a ship pendente lite except for good reason. Brandon J observed:

> On the assumption that the action will remain contested and proceeded to trial, such trial would, unless expedited, be unlikely to come on for about 1 1/2 years. Even if the trial was expedited, I doubt if it would come on in much less than seven months, that is to say some time after the long vacation this year ... It follows that *the continuing costs of maintenance which have to be considered are costs over a period of at least seven months, during which some costs of maintenance will also have to be incurred if physical deterioration of the ship is to be avoided*.
>
> *I accept that the Court should not make an order for the appraisement and sale of a ship pendente lite except for good reason*, and this whether the action is defended or not, I accept further that, where the action is defended and the defendants oppose the making of such an order, the Court should examine more critically than it would normally do in a default action the question whether good reason exists or not.
>
> I do not accept, however, the contention put forward for the owners, that the circumstance that, unless a sale is ordered and *continuing costs of maintaining the arrest will be incurred over a long period, with consequent substantial dimunition in the value of the plaintiffs' security for their claim*, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary, I am of the opinion that it can and often will do so.
>
> It would, in my view, *be unreasonable to keep the ship under arrest at great expense for seven months or more, with the result that. if the bank succeeded in their claim, the amount of their recovery would be reduced by the costs incurred.* (Emphasis added.)

[13] The factors to be considered in establishing whether there was 'good reason' for sale pendente lite were distilled and succinctly laid out by the court in *SSK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 2)* [2017] 8 MLJ 466 after considering *The 'Myrto'*. Azizah Nawawi J (as she then was) stated:

> Therefore, the Court in 'The 'Myrto' has considered the following factors to establish that there was 'good reason' for sale pendente lite:
>
> (i) length of trial;
>
> (ii) the daily costs of maintaining the arrest including berth charges, crews' wages, supply of oil bunkers; supply of water; supply of food and other necessaries and insurance;
>
> (iii) the maintenance costs incurred to avoid physical deterioration of the ship; and
>
> (iv) that consequentially, the Plaintiffs security for its claim would be diminished.

[14] With these principles in mind, I proceeded with my analysis.

ANALYSIS AND FINDINGS OF THE COURT

Good reason — The defendant's failure to provide alternative security

[15] The plaintiff submitted that there is a good reason for the court to make an order for the appraisement and sale of the vessel pendente lite as no security has been offered by the defendant as the shipowner.

[16] As the plaintiff in this action arising out of the collision incident between the vessel and the plaintiff's vessel 'Winning Loyalty', the plaintiff is entitled to security for their claim, according to its reasonably arguable best case together with interests and costs, for its claim against the defendant. This is a principle that was expounded in the Singapore case of *The 'Suhaili 5201' Sing Koon Seng Shipbuilding & Engineering Pte Ltd v The 'Suhaili 5201' (owners and other persons interested in)* [1988] 1 MLJ 210. Wee Chong Jin CJ stated:

> It is not in dispute that on established principles of law, the appellants are entitled to sufficient security to cover the amount of their claims with interest and costs on the basis of their reasonable arguable best case: *The Moschanthy* [1971] 1 Lloyds Rep 37.

[17] In *The Gulf Venture* [1984] 2 Lloyd's Rep 445 the court considered that the reluctance of the shipowners to put up security for the vessel was strong grounds for the making of the application for the sale and appraisement of the vessel pendente lite. At p 134 Sheen J held:

When the solicitors for the plaintiffs gave notice of this motion the facts known to them were these: (1) The shipowners had refused to put up bail because, as they said, 'secondly the value of the vessel is far less than the amount claimed, i.e. about £410,000 (2) After my order made on July 18, 1984, the shipowners had declined to put bail in the lesser sum of £250,000 ...

Those facts provide strong grounds for making this application.

[18] In the *Silver Moon* the court found that since the defendant had failed to offer any suitable security for the release of the vessel, this was a proper case with good reasons and fair grounds for an order for sale pendente lite to be granted.

[19] The defendant in this present case has continuously failed to provide alternative security in respect of the plaintiff's claim despite the security demand being immediately made after the execution of the warrant of arrest. The defendant merely contended that it was waiting for its insurers to provide alternative security to release the vessel but from the correspondence exhibited there is nothing to indicate that this will be forthcoming and there will be an end in sight.

[20] The plaintiff's ground is bolstered by the defendant being unable to pay for costs and expenses of maintaining and preserving the vessel whilst under arrest till final determination of the dispute at trial. This is based on the defendant's repeated admissions that it is financially impecunious in the correspondence of the defendant's solicitors as follows:

(a) the defendant's solicitors stated in a letter dated 25 December 2019 that the defendant had financial difficulty in procuring crew members to man the vessel. The defendant even suggested in the letter that the crewing of the vessel be borne by the plaintiff as arrest expenses;

(b) in a letter to the Marine Department, Melaka dated 26 December 2019 the defendant makes another admission of financial impecuniosity rendering them unable to maintain the vessel during the period of arrest. In the same letter the defendant admitted that the vessel's crew themselves are concerned about nonpayment of wages and that the defendant could only afford two crew members to man the vessel which is in direct contravention of her safe manning requirements; and

(c) in an email dated 17 February 2020 from the defendant's solicitors to Messrs Silverline Maritime the defendant requested that the plaintiff, as the arresting party, supply fresh water to maintain and preserve the vessel whilst under arrest, flouting the defendant's obligations under the merchant shipping laws.

[21] I therefore agreed with the plaintiff's submission that there is a good reason for the court to make an order for the appraisement and sale of the vessel pendente lite as no security has been offered by the defendant as the shipowner.

The plaintiff's application is not premature

[22] It was submitted by the defendant, relying on *UAB Garant v The ship 'Aleksandr Ksenefontov'* (2008) 746 LMLN 1 that the plaintiff's application for sale pendente lite was too early or premature because a full investigation into the claims of the plaintiff must be made before the order for sale is given, especially since the statement of claim is not filed yet. However, it is not the ratio of the case that a full investigation into the claims of the plaintiff must be made before the order for sale is given. The court in the case merely highlighted that a good reason must be given considering that a full investigation into the claims of the plaintiff has not been made. There is no principle in law and practice that an application for sale pendente lite can only be made after the statement of claim is filed. The defendant's inability to provide security is a good reason for granting the order for sale. It is not acceptable for the defendant to say that the statement of claim must be examined first to quantify the security as the defendant could have applied to court for the determination of the form and quantum of the security but did not do so.

Diminution in the value of the vessel

[23] The plaintiff has established that the costs and expenses of maintaining and preserving the vessel under arrest are increasing in diminution in value of the vessel as security for the plaintiff's claim. In this respect, the cost of maintaining the vessel is likely to constitute a significant amount in relation to the vessel's worth and any potential recovery. The defendant has failed to present evidence as to why a sale pendente lite ought not to take place.

[24] In arriving at this conclusion, I have taken into account the following:

(a) the defendant has failed to arrange for bail in order to work its asset due to its own dire financial circumstances which will necessitate the sale of the vessel in the event that judgment is in favour of the plaintiff;

(b) yhe costs and expenses resulting from the arrest of the vessel such as the management fees of the sheriff's agent and the posting of security guards on board will continue to accrue as shown by the sheriff's expenses incurred of RM38,420 and continuing;

(c) the vessel was not being properly maintained even before the arrest and the prolonged continuation of arrest would serve only to reduce her sale value as shown from the report of the sheriff's agent (exh X1) and the admissions of the defendant in its affidavit (encl 56) that the present

continuation of the arrest will serve only to deteriorate the vessel's condition further due to her exposure to perilous elements and deteriorating pipe conditions; and

(d) the defendant has been financially impacted by the arrest and is unable to generate income as admitted in the defendant's affidavit (encl 56) which indicates that the defendant is incapable of discharging its responsibilities as shipowners to maintain and preserve the vessel, having nothing else to meet any judgment sum.

[25] The contentions of the defendant that as at 20 February 2020, the defendant has signed on seven crew members at the cost borne by the defendant and the cost of maintaining the vessel during her arrest without involving any sheriff's cost and expenses except the cost of appointing the sheriff's agent are statements from the Bar without any affidavit evidence.

[26] The defendant's submission that the value of the security represented by the vessel would not be progressively reduced by the continuing cost of maintaining her under arrest because the cost of maintaining the vessel since her arrest until to-date was not substantial and mostly financed by the defendant alone is thus without merit.

[27] I therefore agree with the plaintiff that the vessel has already become a wasting asset and has already diminished in value. Any undue delay in having the vessel sold will result in the further accrual of costs and a further deterioration of the vessel causing substantial hardship to the plaintiff due the plaintiff's security is being severely diminished.

(See *Timberail Sdn Bhd v The owner and/or other persons interested in the vessel 'San Yang 2'* [1998] 6 MLJ 434 [Tab 7] and *Kingstar Shipping Ltd v The owners of the ship or vessel 'Sino Glory' (ex 'Glory Singapura') (St Vincent and the Grenadines Flag)* [1997] MLJU 86; [1997] 3 CLJ 731. The court ordered the sale of the vessels pendente lite, on the grounds that the vessels were wasting assets and the value of the security available to the plaintiffs would be steadily reduced if not sold before trial in the cases of arrested vessels and no security for the release of the vessels was posted).

[28] The reliance of the defendant on the case of *The United States of America v The owners of the vessels, 'Jade Phoenix' and 'Golden Phoenix'* [1988] 2 CLJ 536 as an authority for the principle that when the cost of maintaining an arrested vessel was not substantial this will not cause the value of the security to be progressively diminished is misplaced. In the case, on its particular facts, the vessels were in lay-up thus incurring no costs and there were undertakings by

A the defendants to pay for insurance and maintenance costs until the conclusion of the trial.

Deterioration of the vessel

B **[29]** I do not accept the defendant's contention that the vessel is in commendable state and her rate of depreciation in value is barely minimal. The repair of the vessel's silo pipe is averred to in the defendant's affidavit but no documentary proof was exhibited. The averment that the vessel under arrest is in commendable condition pursuant to preservation and maintenance by the C defendant and that the vessel is in top condition, ready for operational purposes are self-serving averments which contradict the observation of the sheriff's agent in its report.

D **[30]** It is also a relevant consideration that the vessel lies stationary in open sea waters and is exposed to the the elements, coming under great risk during active monsoon season with risk to environmental safety in the busy Malacca harbor. It may not be possible for the High Court sheriff to prevent deterioration of the vessel due to ordinary wear and tear which occurs with the E passage of time and due to the unpredictability of the elements.

[31] The reliance of the defendant on the case of *Bank of Scotland Plc v The Owners of the M/V Union Gold and other cases* [2013] All ER (D) 217 (Jun); [2013] EWHC 1696 (Admlty) to illustrate the defendant's contention F that an order for sale should be granted only when the vessel is aging is misplaced. This case related to the sale of several vessels including one Union Pluto which was aging. The issue was not whether court has the power to order a sale pendente lite but whether the claimant bank can make the sale by way of private treaty instead of through a judicial sale. As Union Pluto was old and G difficult to sell at a market rate by sheriff's sale, the court allowed the vessel to be sold to a specific bidder. The case is thus not relevant for the consideration of the court.

H *Value of the vessel compared to the amount of the plaintiff's claim*

[32] The defendant submitted that the plaintiff's estimation of the forced sale value of the vessel is approximately RM2m but was not supported by evidence to support this estimation except an averment by the plaintiff's I director. Yet there is no contrary affidavit rebutting this and there is no valuation exhibited by the defendant to show that the vessel fetches a higher value. The plaintiff's assertion remains unrebutted by the defendant in evidence.

[33] The defendant submitted that even if the amount of the vessel's sale value is RM2m, this will be sufficient to settle the plaintiff's claim, on a best arguable case basis which is USD408,000 (RM1,716,660 at the rate of USD1 = RM4.21). However, there is evidence to show the vessel is not properly maintained and her value would depreciate further during the arrest. The sherriff's costs are also mounting, without the defendant being unable to bear these costs.

Prejudice to the defendant is not a relevant consideration

[34] I do not agree with the defendant's submission that the consequential orders of encl 37 are prejudicial to its right and interest in the vessel if allowed while the plaintiff's right and interest is still secure even if encl 37 is dismissed. The defendant contended that the vessel is the defendant's main source of income and an order for sale will cause it not to be able to return to their original position once the vessel is sold. However, there is no principle in law that prejudice to the vessel owner if an order for sale is granted is something for the court to consider. It can be equally said that prejudice may be suffered by the plaintiff if the order for sale is not granted as the security provided by the vessel may not meet the plaintiff's claim and other costs if judgment is granted after trial.

[35] The case of *Unicorn Lines (Pty) Ltd v MV Michalis S* 1990 (3) SA 817 (D) relied on by the defendant does not assist the defendant as this is a case where there is a significant difference between the value of the claim and the value of vessel. In the case before the court, the estimated sale value of the vessel is RM2m compared to the value of the claim, a sum equal to RM1,716,660 which is not significant.

Appraisal and sale by private treaty

[36] The defendant submitted that the plaintiff is departing from the normal course of judicial sale by applying for the vessel to be appraised and sold pendente lite by private treaty in the first instance. The defendant further submitted that the plaintiff has to prove the existence of special circumstances. I find this submission to be misconceived. The plaintiff is still proceeding via judicial sale. The plaintiff's prayer No 1 is for judicial sale by way of private treaty by the sheriff. At first instance, the sheriff will put up advertisements and request for bids based on terms and conditions. The sheriff, not the plaintiff, will then decide who the highest bidder is. This is not a departure from the normal course of judicial sale.

A CONCLUSION

[37] Premised on the reasons enumerated above, the plaintiff's application in encl 37 is allowed with costs.

B *Enclosure 37 allowed.*

Reported by Ashok Kumar

C

D

E

F

G

H

I